TESTIMONY OF BURKE MARSHALL ON S. 2803 AND S. 2978
BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE COMMITTEE ON THE JUDICIARY

Mr. Chairman, I thank the Committee for inviting me to testify on S. 2803, the bill that would make the Department of Justice an "independent establishment of the United States Government," and also on S. 2978, the bill that would create a special commission to study the establishment of an independent permanent agency for the investigation and prosecution of official misconduct and other offenses committed by high Government officials. I would like to comment on S. 2803 first, and then on S. 2978.

Both bills are intended, understandably, to prevent a recurrence of the efforts to corrupt the processes of law that comprise the events collectively known as Watergate. To some degree, those events included undermining the integrity of the Department of Justice, by the destruction of evidence and the temporary thwarting of full and impartial investigation and prosecution of those responsible for the Watergate break-in itself, its subsequent cover-up, the unlawful activities of the plumbers unit, the unconstitutional and illegal Huston plan, unlawful campaign contributions and possible executive branch pay-offs responsive to them, and apparent acts of perjury and obstruction of justice related to these activities. So it is indeed understandable and proper that some legislative reaction to the events to prevent repetition of such official conduct be considered.

It is important to remember that these efforts to prevent investigation and prosecution by the Department of Justice did not succeed in the end; the evidence of that lies in the indictment of some 28 persons, including high Government officials

to this date, as well as the consideration of impeachment that is now proceeding in the House of Representatives, in accordance with the provisions of the Constitution. It is also important to note that the corruption did not stem from the Department of Justice as an institution, but from the White House, even though both former Attorney General Mitchell and former ~~District~~ Assistant Attorney General Mardian are officials out of the Justice Department who have been indicted to date. And finally I want to stress how critical it is that the response to the outrages of the Watergate affair be such that it does not, in order to prevent future like abuses of power, undercut the institutional structure of Government that enables it to do its job under honest and responsible leadership, which I believe to be the usual, not the abnormal, condition in the United States. My comments on both S. 2803 and S. 2978 are made with these factors in mind, and I hope they will be taken in that light.

With regard to S. 2803, then, it seems to me that there are two major issues that the Committee should consider. One is the potential effect of passage of the bill on the Department of Justice as an institutional or administrative matter. The other is the issue of the authority of Congress to pass the bill in the light of the structure of Government established by the Constitution. I will discuss these two issues in that order.

As to the first of these problems, my comments are naturally based on my own observation, as an Assistant Attorney General from 1961 to 1965, of the Department's function and its relation to the White House. It may, of course, be that my personal experience is less typical than that of other periods. But I think there would be serious problems at any time for the administration of justice by the Department were S. 2803 to be enacted in its present form.

For one thing, the bill is designed--because of the events to which it is a response--to prevent or at least dilute policy direction of the work of the Department from the White House. I believe that such action should be taken only after the most serious consideration of its consequences. I will mention only the most important areas that would be affected.

One is plainly in the enforcement of the civil rights laws, which is the function with which I am most familiar. As the Committee well knows, law enforcement in this area demands policy direction. It affects the lives of millions of people, and the emotions and passions of millions more. It seems right, not wrong, to me that an administration give policy direction on such matters as busing, employment quotas, school district consolidations, and private discrimination in places of public accommodations, much as I disagree with the policy established by the present administration in most of them. These are all matters, within the framework of the law as stated by Congress and the federal courts, for which the President should have responsibility and political accountability.

Other such areas are, first, the priorities and processes followed by the Criminal Division in the enforcement of the federal criminal laws; second, the application of the Sherman Act and other antitrust statutes to the economic structures of our industries, especially with respect to conglomerate mergers, the so-called structural theories of the monopolization provisions of Section 2 of the Sherman Act, and the relationship between antitrust policy and foreign affairs, foreign trade, and our balance of payments; and third, the degree to which internal security laws are used to suppress political dissent, an issue that has recurred many times in our history. Even the priorities and direction

of such relatively obscure parts of the Department as the Lands and Civil Divisions involve important policy issues, in such matters as the treatment of Indian claims, for example. And the Office of the Solicitor General handles numerous cases each term of the Supreme Court in which the Government's position turns on consideration of national policy.

It seems to me that under our political system Presidential candidates are entitled to run, and--more important--the nation's voters are entitled to vote for candidates on such issues. The thrust of S. 2803 is to prevent this. The provision for a six-year term of office is designed to make political accountability to a particular Administration unwieldy, if not impossible. This is also true, of course, of the provisions restricting the President's right to remove an Attorney General to the causes of neglect of duty or malfeasance in office, and bestowing the power of appointment of the Assistant Attorneys General on the Attorney General. These sections in addition create the possibility of at least a two-year period in which the Attorney General and the rest of the Government (including the Departments such as HEW with which coordination is crucial) are essentially in adversary positions. And I am incidentally troubled for similar reasons at the proposed abolition of the need for Senate confirmation of the Director of the FBI.

In short, I do not believe that the abuse of power by the White House that has taken place justifies this grave an institutional change, that would permanently both insulate the Department of Justice from accountability to the policy direction and priorities of the administration, and at the same time insulate the President from political accountability for the conduct of the law enforcement functions of the Department. In addition, it seems to me that

there is at least fair reason to doubt that the change would in fact prevent future abuse of prosecutorial discretion, or the power to make important law enforcement decisions. The Department of Justice cannot operate in a policy vacuum. One possibility is that it would come to be primarily responsive to permanent power centers in Congress, particularly those who control appropriations--a process and chain of responsibility that does not seem to me on experience to have emphasized impartial, effective and responsible law enforcement. Another, of course, is the danger of having from time to time Attorneys General with personal national political ambitions who would use their control of the Department to their own ends.

Finally, there are two related difficulties, which might, however, be avoided in part by amendments to the bill. One is the necessity for the Government to speak with a single voice in court. Sections 516-519 of Title 28 presently fill this need by giving the Attorney General responsibility for the conduct of the Government's litigation, but it is not easy to see how that would work if HEW, for example, took policy direction from the White House while the Department had contrary instructions from the Attorney General. The second is the important matter of legislative recommendations; while differing views on legislation should be available to the Congress, it is difficult to see how a President would be able effectively to initiate law enforcement reforms over the opposition of an entrenched bureaucracy in the Justice Department not subject to political direction. There is also, I should add, a benefit in itself from the infusion of new people and new priorities into the Department's work.

I realize that these comments are negative and for that reason not responsive to the Committee's search for legislative solutions to the abuses of power that have occurred. But the authority of the Department in particular areas is

not sacrosanct, or constitutionally defined. There are particular areas of law enforcement that perhaps should be carried out in a manner, and by agencies, not directly subject to political influence from the White House. Clearly campaign contribution laws and other controls on the federal election process itself are such areas. It may well be that there are others that are not as immediately, or as normally, subject to abuse of political power. For example, antitrust policy has become in large part an instrument of national economic regulation and policy, whose administration should possibly be delegated to an appropriate expert administrative body. In a different field, I disagree with the legislative decision to strip the Department of its authority to enforce Title VII of the 1964 Civil Rights Act, but the decision that that function should be performed exclusively by the administrative agency established by the Act is certainly a rational and defensible one, and it could be argued that the problems of civil rights policy and enforcement in education have now reached a degree of complexity that they should be handled by an institution of government that combines educators with lawyers. In summary, however, it seems to me that those matters are best dealt with by legislation that addresses the substantive problems involved as well as the administration of law, rather than by legislation that separates the entire process of law enforcement from executive branch control and political accountability.

This brings me to the second main issue raised by S. 2803, which is the question of its constitutionality. My comments on this issue are brief, since the basic elements of the constitutional problem are the subject of many hours of the hearings and debates concerning the various proposals for the establishment of a Special Prosecutor that were before the Senate in November and December of last year.

In summary, I think the constitutional difficulty raised by those proposals is far greater in the case of S. 2803. I personally thought that the doubts about the constitutionality of those proposals would be resolved by the courts in favor of constitutionality, both in the case of the proposals that called for the appointment of a special prosecutor by the court, and those (such as that introduced by Senator Percy, S. 2734) that gave the power of appointment to the President, but restricted his right of removal. Yet I am not convinced that S. 2803 would be upheld by the Supreme Court, or that it should be. The problem is not just the Myers case (Myers v. United States, 272 U.S. 52), which does, however, cast in doubt the power of Congress to restrict in any way the power of the President to remove Presidential appointees in the executive departments. I previously stated in response to a letter from Senator Percy concerning S. 2734 that the Myers case does not, in my view, go so far as to prohibit Congress in all circumstances from limiting the President's power to remove his executive branch appointees. But the Attorney General is the chief law enforcement officer of the United States, both historically and under S. 2803. The Constitution explicitly gives the President--not the Congress nor the courts--the authority and constitutional responsibility to "take care that the laws be faithfully executed." It is one thing to limit his power of removal for a specific, limited and temporary purpose in the extraordinary circumstances now existing, as would the special prosecutor bills, and quite another to do so broadly, permanently, and for all law enforcement purposes, as would S. 2803. In my view that is inconsistent with the structure of Government authorized by the Constitution, with the relationships imposed by that document on the separate branches of federal power, and at least with the specific clause I have just quoted requiring the President to see to it that the laws are faithfully executed.

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I would like to turn now, also briefly, to S. 2978, which proposes a special commission to study the establishment of a Permanent Independent Prosecutor. That seems to me a wise and appropriate way now to meet the enormous interest in the various proposals for such an office. I have serious reservations myself as to the wisdom of creating the office as a permanent agency. The matter of the scope of its jurisdiction, the administrative difficulty of avoiding conflict with the regular law enforcement functions of the Department of Justice, the personnel and other problems that would arise from a fluctuating work load--dependent in an ironic way on the degree of corruption in a particular administration--the questions that would arise concerning the degree and efficacy of cooperation that the Special Prosecutor would in fact be able to obtain from the FBI and other agencies of the executive branch, and the basic mystery of whom the Special Prosecutor is really accountable to, if not to the President or the Attorney General, are all reasons for my reservations. And these administrative, management and jurisdictional issues, of course, simply reflect the underlying constitutional and structural problem caused by any Congressional effort to deal with the potential for abuse of executive power by limiting the grant given by the Constitution to the President of the "executive power" of the federal government, and his duty to take care that its laws are faithfully executed. These are matters, however, that would receive the most careful and responsible consideration of the commission to be established by S. 2978; they are therefore in my judgment reasons to support its favorable consideration by the Committee, and by the Congress, as against proposals that would now create any form of permanent Special Prosecutor not subject to the appointive and removal power of the President.